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Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reply Brief for Petitioner State of New York

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POINT I

Respondents' arguments notwithstanding, the 1985 Act imposes an unprecedented and impermissible affirmative burden upon the States and seriously undermines the principles of the federal system.

The central issue in this case is whether the Congress, pursuant to its powers under the Commerce Clause, may impose affirmative obligations solely upon States as States to engage in an activity essentially in perpetuity. The mandate of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), as we have shown (NY Brief, pp 21-31), accords the individual States no option *not* to participate, just options on *how* to participate in the federal regulatory scheme. To our knowledge, the Act taken as a whole is an affirmative command upon the States pursuant to the Commerce Clause unlike any other previously examined by this Court. Imposed solely on the States,[1] the Act's mandate compels the States to enter the field of low-level radioactive waste disposal, without opportunity to decline to enter or to withdraw from the field,

[1]Remarking on such discriminatory treatment of States in the context of taxation, this Court noted in *New York v United States*, 326 U.S. 572, 575-576 (1946) (Frankfurter, J.):

> Enactments levying taxes made in pursuance of the Constitution are, as other laws are, "the supreme Law of the Land." Art. VI, Constitution of the United States. * * * But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. [Citation omitted]. Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

See also, 326 U.S. at 586 (Stone, C.J., concurring) ("Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government").

and to take actions with implications lasting more than five centuries. Insofar as the Congress, through the Act, enlists unwilling States into its service in this fashion with neither recourse nor reward, it seriously undermines the federalist system.

In their defense of the constitutionality of the Act, respondents and *amici*[2] have sought to direct attention from its most salient attributes and to recharacterize its fundamental effects. They have argued in substance that the Act was well-intentioned; that certain discrete segments of the Act are constitutionally sound; that other federal actions have imposed significant affirmative duties upon the States; that the Act has yielded some beneficial results to the States, including New York, between 1986 and the present. Typical is the argument offered by federal respondents (US Brief, p 37; emphasis in original):

> To be sure, the significant commitment of state resources required to comply with this [take-title] option could raise serious concerns if Congress *required* the States to pursue the course. But the existence of other less burdensome options in this comprehensive program significantly mitigates the burden. Moreover, when the modest level of this intrusion is considered in light of the admittedly grave need for a national resolution to this problem, and the special

[2]Respondents and *amici*, and their respective briefs to this Court, will be referenced as follows: United States of America, *et al.*: federal respondents, US Brief; States of Washington, Nevada and South Carolina: state respondents, States Brief; American College of Nuclear Physicians, *et al.*: *amici* generators, Generators Brief; Rocky Mountain Low-Level Radioactive Waste Compact, *et al.*: *amici* sited compacts, Compacts Brief; U.S. Ecology, Inc.: *amicus* U.S. Ecology, Ecology Brief. The main brief filed by New York State in this matter will be referenced as "NY Brief."

circumstances that led Congress to choose the course that it did, we believe the take-title provision withstands constitutional scrutiny.

These assertions miss the mark and are thus largely irrelevant to the question facing this Court. What is crucial is not the Congress's good intentions but whether the means chosen to deal with the problem of low-level waste disposal are constitutionally permissible in the federal system. We have never questioned the Congressional authority to regulate the disposal of low-level radioactive waste or to attempt to recruit States to do such regulation in its stead, if they so choose. But the fact that the Congress could properly act by other means or that certain portions of the Act could be valid as part of a different statutory scheme, or if viewed in isolation, as the federal government argues, cannot justify the uniquely compulsory ultimate burden imposed by the Act. No past imposition of affirmative duties by the Congress upon the States through the Commerce Clause is analogous to the present Act. None has required a State to engage in an activity involuntarily and without any opportunity for withdrawal.

No arguments raised by respondents or *amici* justify their claim that the Congress, pursuant to its powers under the Commerce Clause, may impose upon the States a burden comparable to the mandate that they must provide for the disposal of low-level radioactive waste and even take title to such waste. Such commandeering of state sovereign power violates the Tenth Amendment and the fundamental principles of federalism. Consequently, the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act") should be stricken.

POINT II

Arguments raised by respondents and *amici* fail to justify the unique and impermissible burdens of the 1985 Act.

The arguments raised by respondents and *amici* in defense of the 1985 Act fail to justify its unique and intrusive mandate upon the States. While these arguments have in large part been addressed in our main brief, we will take the opportunity here presented to briefly recapitulate and expand that earlier discussion.

A. The 1985 Act is not an exercise of the Congress' spending power.

The federal respondents' argument that the incentive payment scheme established by 42 U.S.C. § 2021e(d)(2)(B) is a valid exercise of congressional spending power (US Brief, pp 22-23) is neither relevant nor legally accurate.

Significantly, the federal respondents have limited this argument to provisions of the 1985 Act which New York has not attacked as unconstitutional if viewed separately. Although we do not agree with respondents' suggestion that these provisions assume a "commonplace form" (US Brief, p 21), New York has not argued at any time during this litigation that such provisions, standing alone, would impose unconditional and unconstitutional affirmative duties upon the States. The constitutionality of the milestone provisions is simply beside the point.[3]

Moreover, the spending power argument is totally flawed even when applied only to the milestone provisions as in this case. Contrary to respondents' assertion (US Brief, p 23), the

[3]Arguments offered by *amici* sited compacts defending these provisions on other grounds (Compacts Brief, pp 18-21) are likewise irrelevant.

1985 Act in no manner calls for the spending of federal funds. Indeed, the Congress could hardly have been more explicit in its characterization of these surcharge funds as a trust held for the States and waste generators, rather than as an exercise of federal spending.[4] The fund is not administered through congressional taxation and appropriation.[5] The amount of funds collected into the fund, if any, is determined only in broad scope by Congress; each sited State may decline to impose surcharges or increased surcharges under the 1985 Act. 42 U.S.C. § 2021e(d)(1). Transfers from this surcharge fund are mandated under the Act upon the performance of certain conditions and require no congressional appropriations. Moreover, escrow funds are available to States only if and to the extent that waste generators within their borders have used the Hanford, Beatty, or Barnwell sites.

Finally, this is not a federal spending scheme in which States which decline to participate face only the loss of federal funds. Here, even if a State were to decline to accept such funding, or were ineligible for its receipt for one reason or another, it is nonetheless required to provide some form of disposal program by January 1, 1996 or suffer the conse-

[4]Pursuant to 42 U.S.C. § 2021e(d)(2)(A) (emphasis added),

> The Secretary [of Energy] shall deposit all funds received in a special escrow account. *The funds so deposited shall not be the property of the United States.* The Secretary shall act as trustee for such funds and shall invest them in interest-bearing United States Government Securities with the highest available yield.

[5]As this Court noted in *United States v Butler*, 297 US 1, 65 (1936), the congressional spending power is closely linked with the power "to lay and collect Taxes, Duties, Imports and Excises" and the power of appropriations:

> The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) * * The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States."

quences of the take title provision. In this respect, federal respondents' claim that the States have at their disposal "the simple expedient of not yielding to * * * federal coercion" (US Brief, p 23 [citations omitted]), is greatly misleading.[6]

B. The 1985 Act is not a compact among the States.

A second misguided argument, raised by both the state respondents (States Brief, pp 23-25) and the sited compact *amici* (Sited Compacts Brief, pp 11-18), makes the claim that the 1985 Act, rather than imposing a federal regulatory scheme upon the States, represented a nationwide resolution of the low-level waste disposal problem by all the States acting in concert. According to the state respondents, this form of interstate cooperation, involving a variety of national lobbying organizations working in cooperation with the federal Congress, is the epitome of cooperative federalism and requires a restrained role of review for the federal courts.[7] According to the sited compacts, the 1985 Act represents a scheme of federalism in which "Congress' *sole* role * * * [is] that of *umpire* or *referee* * * *" of state-created agreements (Sited Compacts Brief, p 16; emphasis in original), rather than that of architect of federal policy.

While the records of the Constitutional Convention of 1789 and its aftermath reveal a variety of perspectives on the benefits of the federalist system, an unchallenged attribute of that

[6]Federal respondents' claim in this regard is noteworthy in light of their subsequent assertion that the effects of the take title provision are "substantially mitigate[d]" by the "existence of other less burdensome options in this comprehensive program" (US Brief, p 37).

[7]As the state respondents would have it (States Brief, p 24):

> If the 1980 and 1985 agreements are to be revisited, the proper fora for such a process is among the states' elected Governors in the National Governors Association, the state legislatures in the National Conference of State Legislatures, and their elected representatives in Congress and not the federal courts.

system was the republican form of government at both the federal and state level. This appreciation of the republican form of government was clearly stated in the Constitution's Guarantee Clause;[8] it continues to enjoy undiminished respect among the guardians of our political order.[9]

These principles of representative government are entirely incompatible with the suggestion, urged upon this Court by the state respondents and sited compacts, that the 1985 Act was an agreement among state governments, orchestrated by the National Governors' Association and other national groups. The NGA and similar organizations are not super-legislatures; they have no legislative or executive authority in the federal scheme. They are instead voluntary associations of state officials (or their surrogates), engaged in research and policy analysis. The milieu of these organizations is that of the lobbyist; their tools are persuasion rather than edict. The policy recommendations and draft legislation put forth by the

[8]We note in passing the erroneous claim by the federal respondents (US Brief, pp 39-40) that New York State has "declined to press the [Guarantee Clause] claim on behalf of its citizens". On the contrary, New York contends that this Clause is an element of the federalist structure of the Constitution, upon which its claim in this matter is based. *See, South Carolina v Baker,* 485 US 505, 531 (O'Connor, J., dissenting) (state autonomy in federal system is arguably protected from substantial federal intrusion by virtue of the Guarantee Clause). New York supports the Guarantee Clause arguments made by the County of Allegany in this matter.

[9]*See, e.g., Gregory v Ashcroft,* ____ U.S. ____, 111 S. Ct. 2395, 2400, 115 L Ed 2d 410, 422-423 (1991), citing the Federalist No. 28 (Hamilton):

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

NGA and other bodies do not represent legislative choices of States, nor are they binding upon States or their citizens.

Respondents' nationwide compact theory is dubious even for those States which might be considered to have acted in concert in this matter: those which proposed to join compacts prior to the passage of the 1985 Act. As the legislative history of the 1985 Act indicates, the Congress acceded to the urging of the sited States—not the NGA or other groups—to amend the proposed compacts by adding the take title provision, thereby decisively altering all prior state compacts. While many States chose to remain in compacts in spite of this amendment, the claim that these compacts represent a nationwide agreement of States, merely affirmed by the Congress, is incorrect.[10]

C. At no time did New York State acquiesce in the validity of the 1985 Act.

Related to respondents' "nationwide state agreement" argument is the claim that New York, even if not part of such an agreement among the States dealing with low-level waste, subsequently enjoyed the benefits of this solution for several years, and should not now be permitted to withdraw from the scheme. This argument reflects several misperceptions.

New York's compliance with the Act from 1986 through 1991[11] represented a committed effort to obey federal law, rather than an acceptance of the scheme's constitutionality.

[10] Similarly, state respondents' claim that "[t]he take title provision was * * * accepted by the NGA and the states" (States Brief, p 18) is entirely unsupported and erroneous.

[11]A plan for interim management of New York generated waste was submitted in accordance with the January 1, 1990 milestone. Despite its best efforts, New York was unable to submit a completed application for a license to operate a disposal facility by January 1, 1992, and thus did not meet that milestone. 42 U.S.C. § 202le(e)(1)(D).

Such an effort at compliance cannot serve as a basis for surrendering its own sovereign powers and obligations. As this Court noted in *Guaranty Trust Co. v United States*, 304 U.S. 126, 132-133 (1938), laches arguments do not bind the States:

> The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. * * * Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. [Citations omitted.] So complete has been its acceptance that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included * * * *.

See also, United States v Kirkpatrick, 22 U.S. (9 Wheat.) 720, 735 (1824) (even "the utmost vigilance" would not save public from serious losses if doctrine of laches applied to government operations).[12]

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[12]Moreover, we note that New York unsuccessfully made many efforts to enter into agreements for waste disposal with another State or compact during this period. Indeed, each of the respondent sited States has declined to enter into such an agreement with New York. So too has every State or compact currently planning to operate a disposal facility.

Respondents have also greatly overstated the so-called benefits accepted by New York under the 1985 Act. Under the Act's provisions, continued access to disposal sites since January 1, 1987 has been tightly linked with New York's compliance with milestone requirements for site development. 42 U.S.C. §§ 202le(e)(2)(A)(ii); (B)(ii); (C). The sited States during this period were able to limit and control the amount of waste shipped to their sites from New York and other states, while at the same time receiving significant surcharges from generators of waste, including New York generators. New York's acceptance of surcharge rebates offered little value to the State, inasmuch as state law required that such payments be employed to offset disposal site development costs. Public Authorities Law § 1854-d(2)(a)(i).

Nor did New York at any time act in acquiescence to the take-title provision currently challenged. Although the take-title provision has had a great impact upon the State for several years, and has compelled the State to commence a disposal siting process, such compelled compliance with the milestone requirements of the Act does not reflect an endorsement of or acquiescence in that provision.

D. New York State's challenge to the 1985 Act is ripe for decision by this Court.

Federal respondents' argument that the constitutional challenge to the 1985 Act is not currently ripe for decision by this Court (US Brief, pp 256-26) is also wrong. In light of the multi-year process of development of a disposal site and the dire consequences of the take title provision, the take title threat was and continues to be strongly felt years before the provision might actually go into effect. New York's legislative decision to develop a disposal site—including the implementation of a controversial and expensive site selection process—was driven by this mandate, together with the Act's other

requirements.[13] So too were the timetable of site development, the selection of disposal technologies and site, and the failure to experiment with or implement alternative courses of state action—including a decision to decline to enter the field of waste disposal, or to postpone entering the field until more economical technologies were available.

The problems immediately facing the State in light of the take title provision are hardly hypothetical. While respondents and several *amici* have argued that the State need only contract with another State or compact to avoid the burdens of the provision, there is an obvious flaw in this view: even such a "minimal" intrusion compels the State to enter into an agreement with another State or compact, to an extent far from trivial. The power of choice that is fundamental to state sovereignty implies not merely the choice of means of compliance with the federal scheme, but the choice of whether or not to participate in that scheme at all. Moreover, contrary to respondents' suggestion, a State cannot enter into such an agreement without the cooperation of another State or compact. New York's repeated efforts to secure such cooperation have been unsuccessful. Respondents considerably underestimate the difficulty involved in arranging such an agreement at this time, especially as a consequence of the take title provision. Currently, at least four States or compacts anticipate disposal site completion only after January 1, 1996.[14] Moreover, timely completion is hardly assured even where site development is currently further advanced: as the history of site development subsequent to 1985 has shown, technical and other problems can quickly arise in the course of creating a disposal facility, rendering certain proposed state or compact

[13]See, Affidavit of Assemblyman Clarence Rappleyea (JA80a-81a).

[14]*See*, Office of Environmental Restoration and Waste Management, U.S. Dep't of Energy, *Report to Congress in Response to Public Law 99-240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress* (1991) ("DOE Report"), p viii. This Report has been lodged with the Court by federal respondents.

sites unavailable.[15] In light of these current difficulties, respondents' suggestion that this constitutional issue should be addressed at a later date is meritless.

E. Elimination of the constitutionally defective 1985 Act will not result in a national crisis over radioactive waste disposal.

Somewhat at odds with respondents' ripeness argument is the claim by several *amici* that great urgency surrounds the problem of low-level waste disposal and militates against rejection of the 1985 Act by this Court (US Ecology Brief, pp 13-17; Generators' Brief, p 28). This argument too lacks merit.

While the disposal of low-level radioactive waste is a problem of significant national concern, there is no reasonable basis to conclude that rejection of the 1985 Act by this Court will have severe immediate repercussions. Following such a ruling, Congress will have ample impetus and opportunity to develop a constitutionally acceptable solution to the waste disposal problem. Indeed, in some ways that problem today is far less critical than at the time Congress drafted the 1985 Act. According to the latest United States Department of Energy report on the subject, the volume of annual waste disposal at the Barnwell, Hanford, and Beatty sites dropped from 2.68 million cubic feet to 1.14 million cubic feet between 1985 and 1990. Report, A-6. During this same period, disposal at these sites was significantly below the volume ceiling established in the Act. Report, A-6; 42 U.S.C. § 2021e(b). Moreover, States and compact regions are currently projecting the completion of at least twelve disposal sites by 1997, including one in 1992, two in 1993, four in 1995, and four in 1996. Report, p viii. While some of these facilities might well be reconsidered if the 1985 Act were stricken, there are no grounds to anticipate a "chaotic situation worse than that which prompted

[15]*See, e.g.*, DOE Report, pp xii-xiii, 13-18.

initial passage of the 1980 Act" (US Ecology Brief, p 13). Moreover, should the need arise for a temporary storage expedient, on-site storage practices may safely be entertained, as they must be even under current DOE estimates. Generators in New York and in many other States and compacts have been on notice for some time now of their need to be prepared for temporary storage by the beginning of next year.[16]

Given the range of permissible incentives and directives available to the Congress for treatment of the low-level waste disposal problem, as well as the current availability of long term disposal or short-term storage options for generators, it cannot be credibly argued that a health and safety crisis exists sufficient to mitigate the constitutional infirmities of the 1985 Act.

F. Respondents have failed to show any prior impositions by the Congress or this Court comparable to the mandate challenged here.

We address briefly, and lastly, federal respondents' argument that the Congress may impose affirmative obligations upon States comparable to the take title provision pursuant to its powers under the Commerce Clause (US Brief, pp 29-32).

Respondents continue to err in likening the power of this Court to impose obligations upon States, in the course of resolving cases pursuant to its Art. III, § 2 jurisdiction, with the Congress's power to enact general legislative measures in the regulation of interstate commerce. Respondents would

[16]*See, e.g.*, JA58a (Monaco Affidavit); DOE Report, pp 70-71 ("Beginning in 1993, as much as 80 percent of the volume of the Nation's low-level radioactive waste could be required to be temporarily stored * * *"). *See also*, New York State Energy Research and Development Authority, New York State Low-Level Radioactive Waste Status Report for 1990 (June, 1991), p 11 (describing percentage of in-state generators storing waste). This Report has been lodged with the Court by federal respondents.

have this Court equate its decrees to States resolving interstate water disputes with the obligation under the present Act to engage involuntarily in an activity mandated by Congress (US Brief, p 31). Respondents here err in their claim that a general, common-law duty of States to conserve and augment an interstate stream, or refrain from polluting a neighboring State, is qualitatively comparable to the novel requirement that States regulate or assume responsibility for all low-level radioactive waste within their boundaries (US Brief, p 31). They err more fundamentally in their claim that these cases impose affirmative judicial commands upon the State.

For example, in *Wyoming v Colorado*, 259 U.S. 419 (1922), this Court, exercising original jurisdiction under Art. III, § 2, employed an equitable apportionment analysis under federal common law to resolve a conflict between two States over interstate water supplies. Under this analysis, the Court found that apportionment of waters of the Laramie River should not be based on the river's lowest historical flow, as urged by the downstream State (Wyoming), but rather should be based on the flow that would result from Wyoming's reasonable effort to conserve and equalize the stream. 259 U.S. at 456, 484. The Court did not issue an affirmative command to Wyoming to implement conservation measures; it merely held that an "affirmative duty" of reasonable action should be a factor in apportionment. This principle was repeated in *Colorado v New Mexico*, 459 U.S. 176, 185 (1983) (downstream user may be presumed to take reasonable steps to conserve stream in equitable apportionment assessment).

In *Wyoming v Colorado*, 309 U.S. 572, 580 (1940), this Court stated the unexceptional proposition that a State, upon diverting more upstream water than permitted under a previously issued Supreme Court decree, could be adjudged in contempt just as any other litigant. No command that the State

commence a new program or enter a new field was involved in this discussion. Moreover, contrary to federal respondents' claim (US Brief, p 32 n 44), Congress did not impose an affirmative obligation on state officials under the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618. The express terms of that Act required subsequent State approval to make it binding upon the States involved.[17]

Even *Missouri v Illinois*, 200 U.S. 496 (1906), and *Illinois v City of Milwaukee*, 406 U.S. 91 (1972), which generally declare this Court's jurisdiction to apply common law nuisance and other principles in resolving a particular dispute between two States over the pollution of an interstate water supply, provide no basis for analogy to the case at bar. Finally federal respondents miss the mark with their claim (US Brief, p 31 n 42) that this Court in *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), upheld a judicial command to prepare a set of rules implementing the Court's interpretation of the rights of the parties to the disputes. This Court went on in that case to express clear doubt as to the validity of a court order to *implement* such regulations, noting that the district court itself could assume that duty if necessary (443 U.S. at 695-96):

> Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. It is therefore absurd to argue, as do the fishing associations, both

[17] *See*, Pub. L. No. 101-618, § 205(a)(1) (providing that the federal government negotiate an Operating Agreement with the States involved in the Act), § 210(a)(2)(A)(i) (providing that § 204 of the Act, containing the so-called affirmative obligations on state officials, shall take effect only when all agreements under § 205 enter into effect).

> that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court.

This is a far cry from the implications of the 1985 Act's mandate that the States must be responsible for disposal of low-level radioactive waste.

CONCLUSION

The 1985 Act should be declared unconstitutional.

Dated: Albany, New York
March 23, 1992

Respectfully submitted,

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